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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TIMOTHY DEVENNY, Individually,

Plaintiff,

v.

LAKWOOD FIRE DISTRICT 2, a
subdivision of the City of Lakewood;
FIRE CHIEF KEN SHARP, in his
individual and official capacities,

Defendants.

CASE NO. C 10-5002 KLS

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

The Defendants Lakewood Fire District 2 and Fire Chief Ken Sharp filed a Motion for Summary Judgment requesting dismissal of all of Plaintiff’s claims. ECF No. 34. The Plaintiff filed his response (ECF No. 39) and Defendants their reply (ECF No. 42).

PLAINTIFF’S CLAIMS

Mr. Devenny was employed by the Lakewood Fire District 2 until his was terminated from his job on April 2, 2009. He brought this suit against the Defendants because of his termination and alleges, in his First Amended Complaint (ECF No. 6), that the Defendants (1) infringed his right to equal protection of the law in violation of the Fourteenth Amendment to the

1 United States Constitution, (2) deprived him of a property interest in violation of the Fourteenth
2 Amendment to the United States Constitution; and (3) discriminated against him on the basis of
3 disability in violation of the United States Americans with Disabilities Act of 1990.

4 **SUMMARY OF FACTS**

5 Timothy Devenny started his employment with the Defendant Lakewood Fire District 2
6 on January 7, 1991 and his employment was terminated on April 2, 2009. On October 28, 1996
7 Mr. Devenny was assigned to the position of firefighter/paramedic. In their Motion for
8 Summary Judgment, the defendants identify a number of performance issues they had with Mr.
9 Devenny in his capacity as a paramedic and in 2006 steps were taken to address those various
10 concerns. Finally, on August 20, 2008 Assistant Chief Greg Hull advised Mr. Devenny, in a
11 memo of that date, that he was removing Mr. Devenny from the paramedic program effective
12 September 1, 2008. ECF No. 36, Exh. UU. Mr. Devenny subsequently requested to be removed
13 from the Paramedic Program as of midnight December 31, 2008. ECF No. 36, Exh. VV.

14 In response to complaints regarding his performance as a paramedic, the Lakewood Fire
15 Department reassigned Devenny for retraining under the supervision of Lieutenant/Paramedic
16 Tom Renner. Lt. Renner prepared a “list of expectations” which was signed by Mr. Devenny on
17 January 24, 2007. On January 26, 2007 Lt. Renner document concerns regarding Mr. Devenny
18 smelling of alcohol while on duty. ECF No. 36, Exh. W. This concern was also discussed with
19 Mr. Devenny at a review held on March 1, 2007 with Mr. Devenny, Chief Hull, Lt. Tinsley and
20 Lt. Renner. ECF No. 36, Exh. X.

21 Mr. Devenny received a letter from Assistant Chief Greg Hull on July 10, 2007 which
22 advised the Plaintiff of a proposed disciplinary action in the form of a written reprimand. This
23 proposed disciplinary action was in response to Mr. Deveney’s failure to report for work the
24 morning of July 10, 2007. Battalion Chief Paul Tinsley called Mr. Devenny on July 9, 2007 to

1 see if he would be interested in a callback for overtime on July 10 at 8:00 a.m. for 24 hours. Mr.
2 Devenny accepted the callback, according to Paul Tinsley, but then he failed to report for work
3 the following morning. In a subsequent investigation, Mr. Devenny denied any knowledge of
4 having accepted a callback and thought he must have been asleep as he did not remember talking
5 to anyone. Notes prepared by B.C. Peiffer state his suspicion that Mr. Devenny had been
6 drinking alcohol on July 9, 2007. Mr. Devenny denied consuming alcohol.

7 On May 23, 2008 Assistant Chief Greg Hull wrote a memo to Mr. Devenny regarding a
8 Final Disciplinary Action. In that memo Assistant Chief Greg Hull made Mr. Devenny aware of
9 Hull's concerns regarding Mr. Devenny's lack of truthfulness. In particular, Assistant Chief Hull
10 noted as follows: "I cited 5 instances where I found you gave less than truthful answers. I
11 continue to see a clear pattern of inappropriate statements followed by evasive answers, changing
12 answers, and half truths. My final disciplinary action is to enforce the 10 day suspension,
13 followed by a move to a supervised position on an engine company for a period of two years.
14 You may respond to this disciplinary action in accordance with Article 20 of the collective
15 bargaining agreement." ECF No. 36, Exh. RR.

16 On October 29, 2008 Mr. Devenny drove to work and also reported to work while under
17 the influence of alcohol. Several LFD2 personnel documented the Plaintiff's slow and slurred
18 speech, dilated pupils, strange behavior, dry heaves and odor of alcohol. His blood alcohol
19 content on that date was determined to be 0.26. ECF No. 36, Exhs. WW, XX and YY. Mr.
20 Devenny admits that he "unwittingly" reported to work intoxicated on October 29, 2008. ECF
21 No. 40. It is unclear to the Court how one can "unwittingly" report to work intoxicated unless
22 the level of intoxication was very high – which in this case it was. It is undisputed, however, that
23 he was highly intoxicated when he drove to and reported for work on that date.

1 Mr. Devenny completed a Diagnostic Investigation and Evaluation with Northwest
2 Resources II, Inc. on October 31, 2008. A copy of that evaluation, dated November 3, 2008, was
3 addressed to Greg Hall and Timothy R. Devenny. ECF No. 36, Exh. AAA. It is noted, in the
4 body of the report that the Plaintiff contacted Northwest Resources as referred by his Operations
5 Chief, Greg Hall, and that the precipitating event that led to the assessment was “coming to work
6 intoxicated” with a Blood Alcohol Level of .26. Under the “Legal History” section of the
7 report it was noted that Mr. Devenny had a prior DUI in 2006 and a Negligent Driving 2nd
8 Degree in 2008. With regard to the 2008 conviction, Mr. Devenny advised he just completed a
9 two year deferred prosecution treatment program in September 2008 and that he was sober
10 through the two year program. However, in the “Alcohol/Drug History” section, Mr. Devenny
11 reported that in the last six months he was “drinking Vodka, four to six drinks per occasion, two
12 times per week.”

13 The Clinical Director at Northwest Resources concluded his report by requiring Mr.
14 Devenny to “maintain total abstinence from alcohol and all other non-prescribed mind-altering
15 drugs from the date of the order through the duration of this treatment program.” ECF No. 36,
16 Exh. AAA. The treatment program was to consist of intensive outpatient treatment, a minimum
17 of four to eight weeks, relapse prevention for twelve weeks and monthly monitoring follow up
18 for the remainder of one year.

19 Also on October 31, 2008 Assistant Chief Greg Hull wrote a memo to Mr. Devenny
20 regarding “Proposed Disciplinary Action” to include a 10 day suspension without pay and a “last
21 chance” agreement “containing specific stipulations that you will be held to, including, but not
22 limited to drug/alcohol evaluation, treatment, and testing.” ECF No. 36, Exh. CCC. This action
23 was based “on the district’s determination that you arrived late for work, with a blood alcohol
24 level that was over three times the legal limit. During the interview process with the President of

1 the Local 1488 and me, you blatantly lied about drinking and the events of the following
2 evening. This proposed disciplinary action is in lieu of what I believe would be a very justifiable
3 and immediate termination of your employment for this behavior.” *Id.* The memo concluded by
4 advising Mr. Devenny that he could “respond to this proposed disciplinary action in accordance
5 with the provisions of the collective bargaining agreement.” *Id.*

6 Mr. Devenny completed a 21 day in patient treatment program at Olalla Recovery Center.
7 He was admitted on November 1, and discharged on November 22, 2008.

8 On November 18, 2008 Fire Chief Ken Sharp issued the Final Disciplinary Action:

9 Based on our recent discussions with your union representation, I am
10 issuing you a final disciplinary action in the form of a 5-day suspension without pay.
This five-day suspension will represent a total of 34 hours of shift duty.

11 This disciplinary action is enacted based on our investigation of your
12 behavior on October 29, 2008. Specifically, you reported for duty at Station
23 while highly intoxicated.

13 In accordance with our discussions, you have accepted this final disciplinary
14 action and have agreed with the terms and conditions set forth in the last
chance agreement, along with waiving any further appeals.

15 ECF No. 36, Exh. DDD.

16 The Disciplinary Probation Last Chance Agreement shows a signature date of November
17 10, 2008 and was signed by Fire Chief Ken Sharp, Rick Snodgrass, President of the Union and
18 Tim Devenny. ECF No. 36, EXH. EEE. It is undisputed that Mr. Devenny signed the Last
19 chance Agreement on November 23, 2008 and that it was back dated to November 10, 2008.

20 In the second provision of the Last Chance Agreement, the parties’ agreed that the
21 employer had the right to conduct alcohol testing “regularly, periodically and/or randomly. The
22 parties agree that acceptable levels for such testing shall be determined during the evaluation
23 and/or treatment program. The employee’s failure of any such test and/or the employee’s refusal
24

1 to submit to any alcohol testing required by the employer shall be considered a direct violation of
2 this provision of the agreement.” *Id.*

3 The last paragraph of the Last Chance Agreement reads as follows:

4 It is understood and agreed by the parties executing this agreement that if
5 the employee is found by the employer, in its sole discretion, to have violated
6 any of the three provisions listed above and/or demonstrated any alcohol
7 related behavior at any time during the future duration of his employment
8 with this employer or any successor organization, he will be terminated by
9 the employer and such termination shall be final and not subject to appeal.

10 On March 3, 2009 Greg Hull received a report from Lakeside-Milam Recovery Centers
11 which stated that Mr. Devenny’s progress in the program was “unsatisfactory.” It was noted that
12 the testing on January 28, 2009 was dilute so he came in on January 30, 2009. ECF No. 36, Exh.
13 FFF.

14 On March 24, 2009 Mr. Devenny submitted a urine sample which tested and retested
15 positive for alcohol. ECF No. 36, Exhs. GGG and HHH.

16 On April 2, 2009 Ken Sharp, Fire Chief, wrote a memo to the Plaintiff regarding
17 “Termination of Employment.” ECF No. 36, Exh. III. The termination was based on Mr.
18 Devenny’s test of March 24, 2009 which indicated that the Plaintiff had consumed alcohol,
19 “which constitutes a failure of such test.” Fire Chief Sharp concluded that the Plaintiff had
20 violated the provisions of the last chance agreement and he was, therefore, terminating the
21 Plaintiff from his employment with the district, effective immediately.

22 It is appropriate, at this point in the recitation of facts, to address the Defendants’ Motion
23 to Strike. ECF No. 42. The Defendants request this court strike the Plaintiff’s opinion in
24 Paragraph 10 of his Declaration (ECF No. 40) that sometime near the end of January 2009 he
25 produced an unsatisfactory urine sample as a result of ingesting cold medication. That motion is
26 DENIED as the Court reads that statement not being made for the truth of the matter (that

1 ingesting cold medication caused an unsatisfactory urine test) but rather as a reason why Mr.
2 Devenny reached his conclusion that he only needed to comply with the Civil Service Rules and
3 Regulations. The Court notes, however, that the evidence before the Court regarding an
4 unsatisfactory urine sample the end of January 2009 was that the urine sample was dilute and not
5 that it resulted in a positive test for the presence of alcohol. ECF No. 36, Exh. FFF.

6 Next the Defendants request that the Court strike the statement Mr. Devenny attributes to
7 AC Hull as summarized in Paragraph 10. This is clearly hearsay and it is offered for the truth of
8 the statement therefore the motion to strike is GRANTED.

9 The Court is next asked to strike statements attributed to Dr. Alleman as set forth in
10 Paragraph 12 of the Plaintiff's Declaration. That request is GRANTED as it is clearly hearsay
11 offered for the truth of the matter. Therefore, the following is stricken from consideration:

12 "Alleman informed me that ingestion of cold medication containing alcohol could stay in my
13 system for up to 80 hours and could cause a positive ETG test result."

14 Finally, the Defendants request the Court strike Exhibit 6 on the grounds that the
15 document contains statements that are hearsay, there is no way to determine the reliability of
16 such statements and the Plaintiff has not provided proper evidentiary foundation to admit the
17 documents. That motion is GRANTED. However, even if the Court were to consider the
18 documents, there is no discussion in either one regarding ingestion of cold medication and results
19 of an EtG test nor does the letter from Dr. Alleman suggest that promethazine with codeine even
20 contains alcohol.

21 At the time the Plaintiff was terminated, his employment was governed by the Agreement
22 By and Between Lakewood Fire District 2 and Lakewood Professional Fire Fighters, Local 1488
23 – IAFF covering the period of January 1, 2008 to December 31, 2013 found at ECF No. 36, Exh.
24 H. This Agreement differs, in many respects, from the Agreement in effect when the Plaintiff

1 was hired (see ECF No. 36, Exh. G). In particular, Article 20 – Disciplinary Procedure no
2 longer references “Civil Service Rules and Regulations.” Rather, the Agreement states that “the
3 District has the right to discipline, temporarily lay off, or discharge employees as provided by the
4 laws of the State of Washington and the terms of this Agreement.” While the Plaintiff makes
5 reference in his Declaration (ECF No. 40, Exh. 3) to Rules and Regulations of the Civil Service
6 Commission, revised February 2001, he makes no showing that such rules were even applicable
7 to him. Even if they were, “Section X, Maintaining Discipline” specifically provides for the
8 discharge of an employee whose “drunkenness” precludes the employee from properly
9 performing the functions and duties of any position under civil service.” ECF No. 40, Exh. 3.

10 Mr. Devenny makes reference to his producing an unsatisfactory urine sample the end of
11 January 2009. He asserts that this was a consequence of his ingesting cold medication. The
12 Court notes, as discussed previously, that the urine sample the end of January 2009 was reported
13 as being diluted and there is no reference in that report to the presence of alcohol. The report
14 noted that Mr. Devenny came in on January 30 to retest and there is no information before the
15 Court regarding the results of that retest. Be that as it may, Mr. Devenny attempts to raise a
16 factual question by asserting that due to this unsatisfactory urine sample he did not know what an
17 acceptable level was for alcohol so he “concluded that I would not violate the alcohol testing
18 provision of the LCA as long as I conformed to the standard set by the Rules and Regulations of
19 the Commission regarding intoxicating liquors; this was clearly not a zero-tolerance policy.”
20 ECF No. 40, ¶ 10. The undersigned finds that this does not create a factual question for several
21 reasons. First, the Last Chance Agreement specifically required an evaluation by Northwest
22 Resources and that evaluation required total abstinence. The evaluation was addressed to the
23 Plaintiff and there is nothing unclear or ambiguous about that requirement. Further, there is
24 nothing in the Last Chance Agreement that makes any reference whatsoever to the Civil Service

1 Rules and Regulations so there is no basis for Mr. Devenny to now claim that he decided the
2 Civil Service Rules and Regulations, based on his interpretation, governed the Last Chance
3 Agreement.

4 On April 2, 2009 Mr. Devenny was called into Fire Chief Ken Sharp's office and was
5 terminated from his employment. He was also given a Notice of Termination (ECF No. 36, Exh.
6 III). Prior to the meeting, Mr. Devenny did not know why he was called into the Fire Chief's
7 Office and was not given any union and/or attorney representation at the meeting. He states he
8 was not given a pre-termination hearing and also was not given an opportunity to present any
9 exonerating evidence from Dr. Alleman. He demanded that his case be presented to the Board,
10 the Commission and his Union but Fire Chief Sharp stated that pursuant to the Last Chance
11 Agreement he was not allowed to appeal the decision. Mr. Devenny did not make any further
12 attempt to appeal the termination decision and subsequently filed this civil suit in federal court
13 on January 5, 2010.

14 **SUMMARY JUDGMENT STANDARD**

15 Summary judgment is proper where "the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
18 of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The
19 Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*
20 *O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79
21 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of
22 material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion
23 that a genuine issue of material fact exists, no longer precludes the use of summary judgment.

1 The court notes that Mr. Devenny did not address the allegation of ADA Discrimination
2 in his response brief.

3 Based on the undisputed facts, the Court finds that the Last Chance Agreement was a
4 reasonable accommodation to Mr. Devenny's alcoholism and that Mr. Devenny was terminated
5 of his alcoholism. The Court therefore **GRANTS** the Defendants' motion to dismiss this claim.

6
7 **CIVIL RIGHTS VIOLATION – EQUAL PROTECTION.**

8 Mr. Devenny alleges the Defendants "deprived Plaintiff of his right to equal protection of
9 the law under the Fourteenth Amendment to the United States Constitution." ECF No. 6, p. 12.
10 The Defendants request this Court dismiss this claim on the grounds that there is no evidence
11 that the Plaintiff was treated differently than similarly situated individuals. Mr. Devenny's
12 response to the motion does not mention his claim of equal protection nor does he present any
13 evidence, by way of declaration, to support such a claim. In fact, Mr. Devenny's declaration
14 makes no mention of other employees, much less similarly situated employees. The Court
15 therefore **GRANTS** the Defendants' motion to dismiss this claim.

16
17 **DUE PROCESS OF LAW.**

18 Mr. Devenny alleges that the Defendants "deprived Plaintiff of a property interest in his
19 permanent position of public employment, without due process of law, as guaranteed by the
20 Fourteenth Amendment to the United States Constitution." ECF No. 6, p. 13. This is, in fact,
21 the only issue defended by the Plaintiff in response to the Defendants' motion for summary
22 judgment.

23 Mr. Devenny asserts the Defendants violated his 42 U.S.C. § 1983 federal civil rights.
24 To succeed on such a claim, the Plaintiff must establish (1) that he was deprived of a right

1 secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was
2 committed under color of state law. The Constitutional right asserted by Mr. Devenny is found
3 in Section 1 of the Fourteenth Amendment to the U.S. Constitution which declares "... nor shall
4 any State deprive any person of life, liberty, or property, without due process of law. ..."

5 The Defendants do not contest the Plaintiff's assertion that he had a protected property
6 interest in his job. As such, they also agree that the Plaintiff was entitled to due process.
7 However, they assert that Mr. Devenny was provided all the process he was due when he was
8 initially advised by Assistant Chief Hull of the Proposed Disciplinary Action on October 31,
9 2008 and then, after having discussed the issue with the Plaintiff's union representative, was
10 issued a Final Disciplinary Action on November 18, 2008. It was made clear to Mr. Devenny
11 that he could have been terminated for his appearing at work with a blood alcohol content three
12 times the legal limit and that the proposed discipline was in lieu of that termination.

13 The Final Disciplinary Action, issued by Chief Hull, made it clear to Mr. Devenny that
14 the discipline was based on his intoxication on October 29, 2008 and that the discipline included
15 not only suspension without pay but also the Last Chance Agreement.

16 It is further undisputed that Mr. Devenny tested positive for alcohol on March 24, 2009.
17 This positive test was a violation of the Last Chance Agreement as the acceptable level for
18 testing, as determined in the Evaluation, was total abstinence. This violation then triggered the
19 disciplinary action that was a consequence of Mr. Devenny's coming to work under the influence
20 of alcohol on October 29, 2008. This was not a new form of misconduct that would then trigger
21 new due process concerns. Rather, as noted in his letter of termination and as agreed to by Mr.
22 Devenny, if he violated the specific terms of the Last Chance Agreement "he will be terminated
23 by the employer and such termination shall be final and not subject to appeal."
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1 As noted by the Court in *Lizzio v. Department of the Army*, 534 F.3d 1376, 1385 (Fed.
2 Cir. 2008), “[a]lcohol use, however, was not a separate charge, but was merely the evidence
3 relied on by the FAA to demonstrate that petitioner had breached the “last chance” agreement.”
4 Such is the case here with Mr. Devenny. His confirmed consumption of alcohol breached his
5 last chance agreement. This breach then allowed the employer to administer the earlier
6 suspended discipline, which, in this case, was termination. *See Coca-Cola Bottling Company of*
7 *St. Louis v. AFL-CIO*, 959 F.2d 1438 (8th Cir. 1992).

8 Mr. Devenny also asserts that he should have been advised of his appeal rights which he
9 asserts arise from violation of the Last Chance Agreement. This Court finds that argument
10 unpersuasive. The violation of the Last Chance Agreement, as discussed above, triggered the
11 disciplinary action that was a consequence of his coming to work highly intoxicated. With
12 regard to that underlying action, Mr. Devenny was provided with notice of his rights and he
13 apparently pursued them as his union president actually signed off on the Last Chance
14 Agreement. There is no “notice of appeal rights” associated with violation of the Last Chance
15 Agreement. In fact, in the Agreement Mr. Devenny agreed to give up any rights of appeal he
16 may have. He does not, however, present any argument or evidence that his waiver of appeal
17 rights in the Last Chance Agreement is not enforceable in his case. The Court also notes,
18 however, that Mr. Devenny did not appeal his termination.

19 The undersigned concludes that Mr. Devenny was not deprived of his due process rights
20 when the Defendants enforced the Last Chance Agreement and terminated the Plaintiff from his
21 employment. The Court, therefore, **GRANTS** the Defendants motion to dismiss this claim.
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1 **CONCLUSION**

2 Based on the above, the Court hereby **GRANTS** the Defendants' Summary Judgment
3 Motion and all of the Plaintiff's claims are hereby **DISMISSED**.

4 DATED this 25th day of February, 2011.

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7 Karen L. Strombom
8 United States Magistrate Judge
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